

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

S

D

SENATE BILL 958
Judiciary I Committee Substitute Adopted 5/12/09
Third Edition Engrossed 5/14/09
PROPOSED HOUSE COMMITTEE SUBSTITUTE S958-PCS55491-SQ-78

Short Title: Disciplinary Proceedings/NC Medical Board.

(Public)

Sponsors:

Referred to:

March 26, 2009

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING DISCIPLINARY PROCEEDINGS OF THE NORTH CAROLINA
3 MEDICAL BOARD.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.1.** G.S. 90-1.1 is amended by adding the following new subdivision:

6 "(4a) Modality. – A method of medical treatment."

7 **SECTION 1.2.** G.S. 90-14(a)(6) reads as rewritten:

8 "(6) Unprofessional conduct, including, but not limited to, departure from, or the
9 failure to conform to, the standards of acceptable and prevailing medical
10 practice, or the ethics of the medical profession, irrespective of whether or
11 not a patient is injured thereby, or the committing of any act contrary to
12 honesty, justice, or good morals, whether the same is committed in the
13 course of the ~~physician's~~licensee's practice or otherwise, and whether
14 committed within or without North Carolina. The Board shall not revoke the
15 license of or deny a license to a ~~person~~person, or discipline a licensee in any
16 manner, solely because of that person's practice of a therapy that is
17 experimental, nontraditional, or that departs from acceptable and prevailing
18 medical practices unless, by competent evidence, the Board can establish
19 that the treatment has a safety risk greater than the prevailing treatment or
20 that the treatment is generally not effective."

21 **SECTION 1.3.** G.S. 90-14(g) reads as rewritten:

22 "(g) Prior to taking action against any licensee ~~who practices integrative medicine~~ for
23 providing care not in accordance with the standards of practice for the procedures or treatments
24 administered, the Board shall whenever practical consult with a ~~licensee who practices~~
25 integrative medicine~~licensee who routinely utilizes or is familiar with the same modalities and~~
26 who has an understanding of the standards of practice for the modality administered.
27 Information obtained as result of the consultation shall be available to the licensee at the
28 informal nonpublic precharge conference."

29 **SECTION 1.4.** G.S. 90-14 is amended by adding the following new subsections to
30 read:



* S 9 5 8 - P C S 5 5 4 9 1 - S Q - 7 8 *

1 "(h) No investigation of a licensee shall be initiated upon the direction of a single
2 member of the Board without another Board member concurring. A Board member shall not
3 serve as an expert in determining the basis for the initiation of an investigation.

4 (i) At the time of first communication from the Board or agent of the Board to a
5 licensee regarding a complaint or investigation, the Board shall provide notice in writing to the
6 licensee that informs the licensee: (i) of the existence of any complaint or other information
7 forming the basis for the initiation of an investigation; (ii) that the licensee may retain counsel;
8 (iii) how the Board will communicate with the licensee regarding the investigation or
9 disciplinary proceeding in accordance with subsections (m) and (n) of this section;(iv) that the
10 licensee has a duty to respond to inquiries from the Board concerning any matter affecting the
11 license, and all information supplied to the Board and its staff will be considered by the Board
12 in making a determination with regard to the matter under investigation; (v) that the Board will
13 complete its investigation within six months or provide an explanation as to why it must be
14 extended; and (vi) that if the Board makes a decision to initiate public disciplinary proceedings,
15 the licensee may request in writing an informal nonpublic precharge conference.

16 (j) After the Board has made a nonpublic determination to initiate disciplinary
17 proceedings, but before public charges have been issued, the licensee requesting so in writing,
18 shall be entitled to an informal nonpublic precharge conference. At least five days prior to the
19 informal nonpublic precharge conference, the Board will provide to the licensee the following:
20 (i) all relevant information obtained during an investigation, including exculpatory evidence
21 except for information that would identify an anonymous complainant; (ii) the substance of any
22 written expert opinion that the Board relied upon, not including information that would identify
23 an anonymous complainant or expert reviewer; (iii) notice that the licensee may retain counsel,
24 and if the licensee retains counsel all communications from the Board or agent of the Board
25 regarding the disciplinary proceeding will be made through the licensee's counsel; (iv) notice
26 that if a Board member initiated the investigation then that Board member will not participate
27 in the adjudication of the matter before the Board or hearing committee; (v) notice that the
28 Board may use an administrative law judge or designate hearing officers to conduct hearings as
29 a hearing committee to take evidence; (vi) notice that the hearing shall proceed in the manner
30 prescribed in Article 3A of Chapter 150B of the General Statutes and as otherwise provided in
31 this Article; and (vii) any Board member who serves as a hearing officer in this capacity shall
32 not serve as part of the quorum that determines the final agency decision.

33 (k) Unless the conditions specified in G.S. 150B-3(c) exist, the Board shall not seek to
34 require of a licensee the taking of any action adversely impacting the licensee's medical
35 practice or license without first giving notice of the proposed action, the basis for the proposed
36 action, and information required under subsection (i) of this section.

37 (l) The Board shall complete any investigation initiated pursuant to this section no later
38 than six months from the date of first communication required under subsection (i) of this
39 section, unless the Board provides to the licensee a written explanation of the circumstances
40 and reasons for extending the investigation.

41 (m) If a licensee retains counsel to represent the licensee in any matter related to a
42 complaint, investigation, or proceeding, the Board shall communicate to the licensee through
43 the licensee's counsel.

44 (n) Notwithstanding subsection (m) of this section, if the licensee has retained counsel
45 and the Board has not made a nonpublic determination to initiate disciplinary proceedings, the
46 Board may serve orders to produce, orders to appear, or provide notice that the Board will not
47 be taking any further action against a licensee to both the licensee and the licensee's counsel."

48 **SECTION 2.** G.S. 90-14.2 reads as rewritten:

49 **"§ 90-14.2. Hearing before disciplinary action.**

50 (a) Before the Board shall take disciplinary action against any license granted by it, the
51 licensee shall be given a written notice indicating the ~~general nature of the charges, accusation,~~

1 ~~or complaint~~ charges made against ~~him, the licensee,~~ which notice may be prepared by a
2 committee or one or more members of the Board designated by the Board, and stating that ~~such~~
3 ~~the licensee will be given an opportunity to be heard concerning such charges or complaint~~ the
4 ~~charges~~ at a time and place stated in ~~such the~~ notice, or at a time and place to be thereafter
5 designated by the Board, and the Board shall hold a public hearing not less than 30 days from
6 the date of the service of ~~such~~ notice upon ~~such the~~ licensee, at which ~~such the~~ licensee may
7 appear personally and through counsel, may cross examine witnesses and present evidence in
8 ~~his the licensee's own~~ behalf. A ~~physician~~ licensee who is mentally incompetent shall be
9 represented at such hearing and shall be served with notice as herein provided by and through a
10 guardian ad litem appointed by the clerk of the court of the county in which the ~~physician has~~
11 ~~his residence~~ licensee resides. ~~Such The licensee or physician may, if he desires, may~~ file
12 written answers to the charges ~~or complaints preferred against him~~ within 30 days after the
13 service of ~~such the~~ notice, which answer shall become a part of the record but shall not
14 constitute evidence in the case.

15 (b) Once charges have been issued, neither counsel for the Board nor counsel for the
16 respondent shall communicate ex parte, directly or indirectly, pertaining to a matter that is an
17 issue of fact or a question of law with a hearing officer or Board member who is permitted to
18 participate in a final decision in a disciplinary proceeding. In conducting hearings, the Board
19 shall retain independent counsel to provide advice to the Board or any hearing committee
20 constituted under G.S. 90-14.5(a) concerning contested matters of procedure and evidence."

21 **SECTION 3.** G.S. 90-14.5 reads as rewritten:

22 "**§ 90-14.5. Use of hearing committee and depositions; appointment of hearing officers.**

23 (a) ~~The~~ Except as provided in subsection (a1) of this section, the Board, in its discretion,
24 may designate in writing three or more hearing officers to conduct hearings as a hearing
25 committee to take evidence. A majority of hearing officers participating in a hearing committee
26 shall be licensees of the Board. The Board shall make a reasonable effort to include on the
27 panel at least one physician licensed in the same or similar specialty as the licensee against
28 whom the complaint has been filed. If a current or retired judge as described in G.S. 90-1.1(2)
29 who is not a current or past Board member participates as a hearing officer, the Board may
30 elect not to retain independent counsel for the hearing committee.

31 (a1) The Board may use an administrative law judge consistent with Article 3A of
32 Chapter 150B of the General Statutes in lieu of a hearing committee so long as the Board has
33 not alleged that the licensee failed to meet an applicable standard of medical care.

34 (b) Evidence and testimony may be presented at hearings before the Board or a hearing
35 committee in the form of depositions before any person authorized to administer oaths in
36 accordance with the procedure for the taking of depositions in civil actions in the superior
37 court.

38 (c) The hearing committee shall submit a recommended decision that contains findings
39 of fact and conclusions of law to the Board. Before the Board makes a final decision, it shall
40 give each party an opportunity to file written exceptions to the recommended decision made by
41 the hearing committee and to present oral arguments to the Board. A quorum of the Board will
42 issue a final decision. No member of the Board who served as a member of the hearing
43 committee described in subsection (a) of this section may participate as a member of the
44 quorum of the Board that issues a final agency decision.

45 (d) Hearing officers are entitled to receive per diem compensation and reimbursement
46 for expenses as authorized by the Board. The per diem compensation shall not exceed the
47 amount allowed by G.S. 90-13.3."

48 **SECTION 4.** G.S. 90-14.6 reads as rewritten:

49 "**§ 90-14.6. Evidence admissible.**

50 (a) Except as otherwise provided in proceedings held pursuant to this Article the Board
51 shall admit and hear evidence in the same manner and form as prescribed by law for civil

1 actions. A complete record of such evidence shall be made, together with the other proceedings
2 incident to ~~such~~the hearing.

3 (b) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence, in
4 proceedings held pursuant to this Article, the individual under investigation may call witnesses,
5 including medical practitioners licensed in the United States with training and experience in the
6 same field of practice as the individual under investigation and familiar with the standard of
7 care among members of the same health care profession in North Carolina. Witnesses shall not
8 be restricted to experts certified by the American Board of Medical Specialties. A Board
9 member shall not testify as an expert witness.

10 (c) Subject to the North Carolina Rules of Civil Procedure and Rules of Evidence,
11 statements contained in medical or scientific literature shall be competent evidence in
12 proceedings held pursuant to this Article. Documentary evidence may be received in the form
13 of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are
14 available for examination by the parties. Upon timely request, a party shall be given an
15 opportunity to compare the copy with the original if available.

16 (d) When evidence is not reasonably available under the Rules of Civil Procedure and
17 Rules of Evidence to show relevant facts, then the most reliable and substantial evidence
18 available shall be admitted.

19 (e) Any final agency decision of the Board shall be based upon a preponderance of the
20 evidence admitted in the hearing."

21 **SECTION 5.** G.S. 90-14.8 reads as rewritten:

22 "**§ 90-14.8. Appeal from Board's decision taking disciplinary action on a license.**

23 (a) A licensee against whom the Board imposes any public disciplinary sanction, as
24 authorized under G.S. 90-14(a), may appeal such action.

25 (b) ~~A physician whose license is revoked or suspended by the Board~~ A licensee against
26 whom any public disciplinary sanction is imposed by the Board may obtain a review of the
27 decision of the Board in the Superior Court of Wake County~~County~~, or the county in which the
28 licensee resides, upon filing with the secretary of the Board a written notice of appeal within
29 20~~30~~30 days after the date of the service of the decision of the Board, stating all exceptions taken
30 to the decision of the Board and indicating the court in which the appeal is to be heard. The
31 court shall schedule and hear the case within six months of the filing of the appeal.

32 (c) Within 30 days after the receipt of a notice of appeal as herein provided, the Board
33 shall prepare, certify and file with the clerk of the Superior Court ~~of Wake County~~ in the county
34 where the notice of appeal has been filed the record of the case comprising a copy of the
35 charges, notice of hearing, transcript of testimony, and copies of documents or other written
36 evidence produced at the hearing, decision of the Board, and notice of appeal containing
37 exceptions to the decision of the Board."

38 **SECTION 6.** G.S. 90-16(e1) reads as rewritten:

39 "(e1) When the Board receives a complaint regarding the care of a patient, the Board shall
40 provide the licensee with a copy of the complaint as soon as practical and inform the
41 complainant of the disposition of the Board's inquiry into the complaint and the Board's basis
42 for that disposition. If providing a copy of the complaint identifies an anonymous complainant
43 or compromises the integrity of an investigation, the Board shall provide the licensee with a
44 summary of all substantial elements of the complaint. Upon written request of a patient, the
45 Board may provide the patient a licensee's written response to a complaint filed by the patient
46 with the Board regarding the patient's care. Upon written request of a complainant, who is not
47 the patient but is authorized by State and federal law to receive protected health information
48 about the patient, the Board may provide the complainant a licensee's written response to a
49 complaint filed with the Board regarding the patient's care. Any information furnished to the
50 patient or complainant pursuant to this subsection shall be inadmissible in evidence in any civil
51 proceeding. However, information, documents, or records otherwise available are not immune

1 from discovery or use in a civil action merely because they were included in the Board's review
2 or were the subject of information furnished to the patient or complainant pursuant to this
3 subsection."

4 **SECTION 7.** This act becomes effective October 1, 2009, and applies to
5 investigative or disciplinary actions initiated on or after that date.